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No. 03-325

IN THE

Supreme Court of the United States

ANDREAS GAL, NORMAN H. HALPER and OLIVER LAZARE, as Executors of the Estate of PAUL LAZARE, and PANEX CO.,
Petitioners,

v.

DEAN C. PLASKETT, as Trustee for the Natural Resources of the Territory of the Virgin Islands, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Where numerous settling parties in two related environmental actions under the Comprehensive Environmental Response, Compensation and Liability Act, as amended ("CERCLA"), 42 U.S.C. §§ 9601 *et seq.*, submitted an extensive two-volume appendix in support of their joint motion for judicial approval of their consent decree ending more than a decade of litigation, several non-settling parties submitted no documentary record in opposition to the joint motion, and the non-settling parties no longer challenge the lower courts' approval of the CERCLA consent decree but rather seek this Court's review of the district court's factual findings due to their concern about the potential impact of those findings in future proceedings:

1. Did the court of appeals apply the proper standard of review in affirming the district court's approval of the CERCLA consent decree?

2. Did the court of appeals properly reject as baseless the non-settling parties' assertion that the findings set forth in the district court's opinion were erroneous?

STATEMENT UNDER RULE 29.6

In accordance with Rule 29.6 of the Rules of this Court, respondents state as follows:

Esso Standard Oil Co. (Puerto Rico) is an indirect subsidiary of Exxon Mobil Corporation. Esso Standard Oil S.A. Ltd. is a direct subsidiary of Exxon Mobil Corporation. Esso Virgin Islands, Inc. is a direct subsidiary of Exxon Mobil Corporation.

Texaco Inc. identifies the following parent corporations: Chevron Asiatic Limited, ChevronTexaco Overseas Petroleum Inc., and ChevronTexaco Corporation. Texaco Caribbean Inc. identifies the following parent corporations: ChevronTexaco Global Energy Inc., Texaco Overseas Holdings Inc., TRMI Holdings Inc., Texaco Inc., Chevron Asiatic Limited, ChevronTexaco Overseas Petroleum Inc., and ChevronTexaco Corporation. Texaco Puerto Rico Inc. identifies the following parent corporations: Texaco Estrella Puerto Rico Inc., ChevronTexaco Global Energy Inc., Texaco Overseas Holdings Inc., TRMI Holdings Inc., Texaco Inc., Chevron Asiatic Limited, ChevronTexaco Overseas Petroleum Inc., and ChevronTexaco Corporation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
A. Proceedings in the District Court	2
B. The Court of Appeals' Decision	4
ARGUMENT	8
I. THE COURT OF APPEALS APPLIED THE CORRECT STANDARD OF REVIEW IN AFFIRMING THE DISTRICT COURT'S APPROVAL OF THE CERCLA CONSENT DECREE	9
II. THE COURT OF APPEALS PROPERLY REJECTED AS BASELESS PETITIONERS' ARGUMENT THAT THE DISTRICT COURT'S FINDINGS WERE ERRONEOUS	17
CONCLUSION	22

TABLE OF AUTHORITIES

CASES	Page
Comm'r of the DPNR v. Esso Standard Oil, Civ. No. 1998-206 (D.V.I. filed Oct. 15, 2001)	18
Dedham Water Co. v. Cumberland Farms Dairy, 972 F.2d 453 (1st Cir. 1992)	14
Henglein v. Colt Indus. Operating Corp., 260 F.3d 201 (3d Cir. 2001)	14
Molski v. Gleich, 318 F.3d 937 (9th Cir. 2003)	12
Pullman-Standard v. Swint, 456 U.S. 273 (1982)	14
Texas v. Mead, 465 U.S. 1041 (1984)	20
United States v. BP Amoco Oil PLC, 277 F.3d 1012 (8th Cir. 2002)	6, 11
United States v. Cannons Engineering Corp., 899 F.2d 79 (1st Cir. 1990)	6, 11
United States v. Charles George Trucking, 34 F.3d 1081 (1st Cir. 1994)	6, 13
United States v. Colorado & Eastern R. R., 50 F.3d 1530 (10th Cir. 1995)	15
United States v. Davis, 261 F.3d 1 (1st Cir. 2001)	13, 14
United States v. Metropolitan St. Louis Sewer Dist., 952 F.2d 1040 (8th Cir. 1992)	11
United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001)	6
United States v. Montrose Chem. Corp. of California, 50 F.3d 741 (9th Cir. 1995)	15, 16
United States v. SEPTA, 235 F.3d 817 (3d Cir. 2000)	10
United States v. Union Elec. Co., 132 F.3d 422 (8th Cir. 1997)	11
Vasquez v. United States, 454 U.S. 975 (1981)	20

TABLE OF AUTHORITIES—Continued

RULES AND STATUTES

Page

Federal Rule of Civil Procedure 23(e) 13
Federal Rule of Civil Procedure 52(a) 13, 14, 15
Federal Rule of Civil Procedure 56 14
U.S. Supreme Court Rule 10 20

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In their Petition for a Writ of Certiorari ("Petition"), petitioners Andreas Gal, Norman H. Halper and Oliver Lazare as Executors of the Estate of Paul Lazare, and Panex Co. (the "Laga Parties") ask this Court to grant certiorari to review only that portion of the court of appeals' opinion relating to the district court's findings of fact and conclusions of law supporting its approval of the consent decree. Petitioners expressly do not challenge the court of appeals' affirmance of the district court's decision approving the respondents' consent decree. Petitioners' concern is not the relief granted below, but the potential effect the findings of fact and conclusions of law might have on the non-settling Laga Parties in subsequent proceedings. Given that petitioners do

not attack the approval of the consent decree, and only raise hypothetical concerns about the potential effect of the district court's underlying findings and conclusions in subsequent proceedings, petitioners do not raise an issue that merits this Court's review. Moreover, both the district court and the court of appeals properly rejected the arguments presented, without any documentary support, by the non-settling Laga Parties in response to the well-documented joint motion of respondents to approve the CERCLA consent decree.

A. Proceedings in the District Court

On October 18, 2000, plaintiff, Commissioner of the Department of Planning and Natural Resources, Dean C. Plaskett, in his capacity as Trustee for the Natural Resources of the Territory of the United States Virgin Islands ("Trustee"); the Territory of the United States Virgin Islands (the "Virgin Islands"), including the Department of Education ("VIDOE"), Department of Planning and Natural Resources ("DPNR"), and the Virgin Islands Housing Authority ("VIHA"); Esso Virgin Islands, Inc., Esso Standard Oil Co. (Puerto Rico), and Esso Standard Oil S.A. Ltd. (collectively "Esso"); Texaco Caribbean, Inc., Texaco Puerto Rico, Inc. and Texaco, Inc. (collectively "Texaco"); and Vernon Morgan (collectively "the Settling Parties") filed a joint motion (the "Joint Motion") with the district court to approve and enter the Agreement and Consent Decree ("Consent Decree"). (A1213-A2013) The purpose of the Consent Decree was to settle the Settling Parties' differences in two lawsuits, Civil No. 1998/206 ("NRD Action") and Civil No. 1996/0054(B) ("CERCLA Action").

In support of their Joint Motion, the Settling Parties filed a two-volume Appendix (A1218-A2013), including the Consent Decree, key documents from the Administrative Record compiled by the U.S. Environmental Protection Agency ("EPA") and the Settling Parties during their extensive

investigation of the Tutu Wellfield Site ("Tutu Site"), and expert reports prepared in the CERCLA Action. The Settling Parties' February 28, 2000 Memorandum of Law in Support of Joint Motion ("Supporting Memorandum") (A232) also described the Trustee's retention of experts to assess the value of the natural resource damages ("NRDs"). In particular, the Trustee hired Industrial Economics, Inc., specialists in natural resource economics and damages, to develop a preliminary assessment, which included two damage components—"use related loss" of $16.9 million and "non-use related loss" of $19 million. (A232)

On or about January 19, 2001, three non-settling parties, Andreas Gal ("Gal"), the Estate of Paul Lazare ("Lazare"), and the Successor Panex Industries, Inc. Stockholders' Liquidating Trust (the "Successor Trust"), filed oppositions to the Joint Motion. (A2016-A2049) They objected to the Consent Decree on two grounds: (i) the record "fail[s] to provide sufficient information upon which to evaluate whether the settlement terms are fair and reasonable;" and (ii) the involvement of John K. Dema, one of several attorneys representing the Trustee, was not appropriate. The non-settling parties did not submit any documents, expert reports or other evidence to support their opposition to the Consent Decree.

On or about February 6, 2001, the Settling Parties filed reply memoranda. (A2064-A2085; A2086-A2095) In addition to the two-volume Appendix already provided in support of the Joint Motion, Esso and Texaco referred the court to eight volumes of exhibits they had previously filed with the court in opposition to other motions filed in the CERCLA Action, providing additional evidence demonstrating the substantial responsibility of the former Laga facility for the contamination at Tutu. (A2068)

The district court scheduled a hearing on the Joint Motion for February 14, 2001. (A2045) At the hearing, the Trustee

presented five additional exhibits. (A2180, A2243-A2279) Although the district court afforded the Laga Parties a full opportunity to do so, the Laga Parties once again elected not to present any exhibits. (A2167-A2168, A2239-A2240)

The district court issued an Order on February 20, 2001 directing the parties to submit proposed findings of fact and conclusions of law. (A2280) The Settling Parties did so, with detailed supporting citations to the documentary record, on March 16, 2001. (A2282-A2343) The Laga Parties also submitted proposed findings of fact and conclusions of law (A2344-A2357), but they made no meaningful attempt to provide a factual response to the Settling Parties' factual findings to which they now take exception. Indeed, during the district court's consideration of the Joint Motion, the Laga Parties never provided any citations to the deposition testimony they included in the Appendix on appeal. (A237-A617, A650-A807, A1130-A1212, A2364-A2372)

Eight months after the February hearing, on October 15, 2001, the district court issued its Memorandum Opinion and Order approving the Consent Decree and entering it as a final judgment. (A5-A53) In doing so, the district court adopted most, but not all, of the Settling Parties' proposed findings of fact and conclusions of law. The Laga Parties' appeal followed.

B. The Court of Appeals' Decision

The court of appeals unanimously affirmed. Pet. App. 1a-14a. The court of appeals addressed the questions presented by the Laga Parties' appeal: (1) whether the district court properly held that the CERCLA consent decree was fair, reasonable, and in the public interest; and (2) whether the district court erred by approving the CERCLA consent decree without holding a full evidentiary hearing. Pet. App. 5a.

On the first issue, the court of appeals identified the proper standard of review for appellate review of judicial approval of

consent decrees in CERCLA actions and the principle that "[a] court should approve a consent decree if it is fair, reasonable, and consistent with CERCLA's goals." Pet. App. 7a. After noting the extensive documentary record presented by the Settling Parties in support of their motion to approve the Consent Decree (Pet. App. 3a),[1] the court of appeals observed that "the Laga Parties offered no factual or documentary support for their arguments before the District Court." Pet. App. 8a.[2] After reviewing the evidence offered by the Settling Parties, the absence of evidence offered by the Laga Parties, as well as the procedural and substantive fairness of the Consent Decree, the court of appeals found that the district court had not abused its discretion in approving the Consent Decree. Pet. App. 11a.

In Section III of its opinion, the court of appeals considered the second issue raised by the Laga Parties' appeal, *i.e.*, "the Laga Parties challenge the District Court's failure to hold a full evidentiary hearing prior to adopting the findings and conclusions, asserting they suffered 'deprivations of the rights to due process to which [they] are entitled under the

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[1] The court of appeals expressly noted that "[i]n support of their joint motion to the District Court, the Settling Parties filed a two-volume appendix, including the consent decree and various EPA and other expert reports." Pet. App. 3a. *See also* Pet. App. 12a ("The Settling Parties produced an extensive documentary record to support their joint motion. The record included exhibits, expert reports, and deposition testimony detailing the fruits of more than a decade of environmental investigation at the Tutu site.").

[2] The court of appeals further observed that the Laga Parties "elected not to offer any expert witnesses and submitted no expert reports to challenge those submitted by the Settling Parties. While they provide express references to deposition testimony to this court on appeal, they failed to do so before the District Court." Pet. App. 8a. *See also* Pet. App. 12a ("In contrast, the Laga Parties presented no competing documents, testimony, or analysis. They merely contested the Settling Parties' evidence as insufficient and replete with errors.").

U.S. Constitution.'" Pet. App. 11a-12a. After emphasizing CERCLA's encouragement of fair and efficient settlements and the district court's provision to the Laga Parties of "an opportunity to submit evidence and present arguments to challenge the proposed CERCLA consent decree[,]" the court of appeals properly recognized that "[t]he Constitution does not require the court to conduct a full and formal evidentiary hearing to satisfy due process concerns." Pet. App. 12a.[3] The court of appeals then held that "[t]he decision whether to hold a full-blown evidentiary hearing is committed to the sound discretion of the District Court." Pet. App. 12a. It found that the district court properly exercised its discretion and, therefore, found "no violation of the Laga Parties' due process rights." Pet. App. 12a.[4]

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[3] Citing *United States v. BP Amoco Oil PLC*, 277 F.3d 1012, 1017 (8th Cir. 2002) ("It is within the sound discretion of the trial court to decide whether an evidentiary hearing is necessary before ruling on a proposed consent decree."). *See also United States v. Cannons Engineering Corp.*, 899 F.2d 79, 94 (1st Cir. 1990) (recognizing the "proposition that 'motions do not usually culminate in evidentiary hearings'" and observing that "[d]istrict courts are busy places and makework hearings are to be avoided"); and *United States v. Charles George Trucking*, 34 F.3d 1081, 1085 (1st Cir. 1994) ("Requiring hearings to review the reasonableness of CERCLA consent decrees as a matter of course would frustrate the statutory objective of expeditious settlement. [Citation omitted.] Consequently, requests for evidentiary hearings are, for the most part, routinely denied—and properly so—at the consent decree stage in environmental cases.").

[4] The Laga Parties cite *United States v. Microsoft Corp.*, 253 F.3d 34, 101 (D.C. Cir. 2001), for the proposition that it is "a cardinal principle of our system of justice that factual disputes must be heard in open court and resolved through trial-like evidentiary proceedings." Petition at 5. However, the *Microsoft* case did not involve the court's review and approval of a CERCLA consent decree, but rather the entry of injunctive relief against Microsoft in a federal antitrust action. No injunctive relief has been entered against the Laga Parties here.

The court of appeals then addressed the Laga Parties' complaint that the district court had "erred by adopting nearly verbatim all of the factual findings and conclusions of law submitted by the Settling Parties[.]" Pet. App. 13a. It once again emphasized that "the Laga Parties failed to submit deposition testimony, expert reports, or analysis to support their criticism of the Settling Parties' evidence, and were afforded ample opportunity to be heard prior to and on February 14, 2001." Pet. App. 13a. At the end of Section III, the court of appeals unanimously found "no abuse of discretion" on the second issue presented by petitioners' appeal, *i.e.*, whether the district court erred in entering findings of fact and conclusions of law without holding a full evidentiary hearing. Pet. App. 14a.

At the end of its opinion, the court of appeals dropped a final footnote to address the Laga Parties' contention that the district court's findings of fact and conclusions of law were "erroneous." Pet. App. 14a n.7. The court of appeals rejected this argument:

> The basis for many of these arguments is the District Court's decision not to hold a full evidentiary hearing, which we have addressed above. We find these attacks baseless, especially given the Laga Parties' failure to offer their own independent evidence to contradict the volumes of evidence submitted by the Settling Parties.

Id.

After the court of appeals entered its opinion on April 8, 2003, the Laga Parties on April 21, 2003 filed a motion for extension of time to file a petition for rehearing by panel only ("Extension Motion"). In paragraph 4 of the Extension Motion, the Laga Parties expressly stated that their "anticipated petition for rehearing would not seek reconsideration of [the court of appeals'] affirmation of the lower court's decision to approve the CERCLA settlement between appellees." In fact, they asserted that they did "not intend to seek

any stay and the petition for rehearing would not seek to hinder appellees' completion of their settlement. Accordingly, granting this motion would entail no prejudice to appellees." *Id.* Finally, they represented to the court of appeals that their "petition for rehearing would narrowly target that portion of the panel's decision which approved the lower court's entry of extensive factual findings (and legal conclusions) and the procedures leading thereto." *Id.* at ¶ 5. After the court of appeals granted the Extension Motion on April 25, 2003, the Laga Parties filed their petition for panel rehearing on May 5, 2003 ("Rehearing Petition"). In that petition (at 1), the Laga Parties expressly stated that they did "not seek reconsideration of the panel's affirmance of the district court's approval of appellees' settlement[.]" Instead, they expressed concern that "the panel may not fully have appreciated, however, [that] this Court's affirmance of the district court's entry of 'findings of fact and conclusions of law' carries with it consequences unfair to appellants (and others) unrelated to the consent decree approval *per se*." *Id.* The panel unanimously denied the Laga Parties' Rehearing Petition by Order dated May 21, 2003.

ARGUMENT

In their Petition seeking this Court's review, the Laga Parties expressly concede that they do not challenge the lower courts' only official judgment below, *i.e.*, the approval of the CERCLA consent decree. Rather they focus their attack on what the district court characterized as its "findings of fact." The Laga Parties press this appeal because they are concerned about what *may* happen in future proceedings in the NRD Action where the Trustee *may* seek to use the findings against the Laga Parties. As the court of appeals recognized below, any such concern is not ripe for determination. If and when the Trustee seeks to use those findings in the NRD Action, the Laga Parties may then raise this issue.

Moreover, as set forth below, the court of appeals applied the proper standard of review in affirming the district court's approval of the Consent Decree so there is no conflict among the Circuits as the Laga Parties erroneously contend. In addition, the court of appeals properly rejected as baseless the Laga Parties' "fact bound" argument that the district court's findings were erroneous.

I. THE COURT OF APPEALS APPLIED THE CORRECT STANDARD OF REVIEW IN AFFIRMING THE DISTRICT COURT'S APPROVAL OF THE CERCLA CONSENT DECREE.

The court of appeals properly applied an abuse of discretion standard of review in its consideration of the two primary issues presented by the Laga Parties' appeal: (1) whether the district court erred in holding that the CERCLA consent decree was fair, reasonable, and consistent with the public interest; and (2) whether the district court erred in failing to conduct a full evidentiary hearing. In an effort to suggest the existence of a conflict among the Circuits, the Laga Parties mischaracterize the court of appeals' ruling as announcing a new standard of review applicable to the review of a district court's entry of its factual findings and conclusions of law. The court of appeals, however, announced no new standard of review, but rather properly applied an abuse of discretion standard in its affirmation of the district court's approval of the Consent Decree.[5]

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[5] As set forth below, the district court's provision of a detailed explanation of the basis for its exercise of discretion to approve the Consent Decree does not render its ruling subject to a more rigorous standard of review on appeal.

After briefly reviewing the procedural history before the district court, the court of appeals began its legal discussion by summarizing the Laga Parties' appeal as follows:

> This appeal presents two questions. First, was the District Court's approval of the consent decree fair, reasonable, and in the public interest? Second, did the District Court err by approving the consent decree without holding a full evidentiary hearing?

Pet. App. 5a.

The court of appeals addressed the first question in Section II of its opinion. Pet. App. 5a-11a. In doing so, the court of appeals noted that it had only "recently had occasion to consider judicial approvals of consent decrees in CERCLA actions. *United States v. SEPTA*, 235 F.3d 817, 822 (3d Cir. 2000)." Pet. App. 6a.[6] The court of appeals quoted from its prior decision in *SEPTA* to address the appropriate standard of review on this question:

> We approach our task mindful that, on appeal, a district court's approval of a consent decree in CERCLA litigation is encased in a double layer of swaddling. The first layer is the deference the district court owes to [the] EPA's expertise and to the law's policy of encouraging settlement; the second layer is the deference we owe to the district court's discretion. Thus, [a litigant] is faced with a heavy burden in its attempt to persuade us that the district court abused its discretion by approving the consent decree.

Pet. App. 6a-7a.[7] At the conclusion of Section II of its opinion, the court of appeals applied the proper standard and

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[6] Indeed, the Laga Parties concede that the standard for determining a motion to approve a CERCLA consent decree is "well-settled." Petition at 12 n.8.

[7] Indeed, the Laga Parties recognized the applicability of the abuse of discretion standard on this issue in their brief below. Brief for Appellants, at 3.

unanimously concluded: "We see no abuse of discretion." Pet. App. 11a.[8]

The court of appeals addressed the second question in Section III of its opinion. Pet. App. 11a-14a. In considering whether the district court erred by approving the Consent Decree without holding a full evidentiary hearing, the court of appeals ruled that "[t]he Constitution does not require the court to conduct a full and formal evidentiary hearing to satisfy due process concerns." Pet. App. 12a. In support of that ruling, the court of appeals cited *BP Amoco Oil*, 277 F.3d at 1017, to the effect that "[i]t is within the sound discretion of the trial court to decide whether an evidentiary hearing is necessary before ruling on a proposed consent decree." Pet. App. 12a. In *BP Amoco Oil*, 277 F.3d at 1017, the Court of Appeals for the Eighth Circuit expressly stated that "[w]e review the district court's denial of [the appellant's] request for an evidentiary hearing for an abuse of discretion." *See also United States v. Union Elec. Co.*, 132 F.3d 422, 430 (8th Cir. 1997); *United States v. Metropolitan St. Louis Sewer Dist.*, 952 F.2d 1040, 1044 (8th Cir. 1992); and *Cannons*, 899 F.2d at 93-94. At the end of Section III, correctly applying the abuse of discretion standard to the second issue raised by the Laga Parties in their appeal, the court of appeals unanimously concluded: "We find no abuse of discretion." Pet. App. 14a.

The foregoing review of the analytical structure of the court of appeals' analysis demonstrates that the court of appeals applied an abuse of discretion standard throughout its opinion unanimously affirming the district court's approval of the Consent Decree. The Laga Parties focus on one sentence in the court of appeals' opinion to suggest that the court of

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[8] In the current Petition and in their Rehearing Petition below, the Laga Parties abandoned their challenge to the district court's approval of the Consent Decree as fair, reasonable, and consistent with the public interest.

appeals "announced" a "new, non-evidentiary standard" that "findings of fact may be entered when they are 'fair, reasonable and consistent with the public interest' without reference to which evidence, if any, supports them[.]" Petition at 4 (quoting the court of appeals' opinion only in part and out of context). The court of appeals' opinion announced no new standard, but rather ruled that the district court did not abuse its discretion in approving the Consent Decree, particularly given that the Settling Parties supported their Joint Motion with an exhaustive documentary record and the Laga Parties provided no record to support their opposition.

In addition to mischaracterizing the standard applied by the court of appeals in affirming the approval of the Consent Decree, the Laga Parties also argue that the court of appeals should have applied a clearly erroneous standard to its review of the district court's factual findings. In doing so, the Laga Parties cite inapposite precedent relating to the review of findings of fact in other contexts and fail to cite any precedent where an appellate court has applied a clearly erroneous standard when reviewing the judicial approval of a CERCLA consent decree.

The Laga Parties cite four cases which they characterize as supporting the proposition that "[w]hen reviewing findings of fact in the context of a consent decree, the standard for review followed by all other circuits is 'clearly erroneous[.]'" Petition at 4 n.2; *see also id.* at 15 n.13. However, none of these cases support the Laga Parties' contention that an appellate court reviewing a judicial approval of a CERCLA consent decree should apply a clearly erroneous standard, rather than an abuse of discretion standard, to the findings underlying the court's exercise of its discretion to approve the consent decree if it is fair, reasonable, and consistent with the public interest.

The Laga Parties first cite *Molski v. Gleich*, 318 F.3d 937 (9th Cir. 2003). However, in that case, the Court of Appeals

for the Ninth Circuit did not review a judicial approval of a CERCLA consent decree; rather, it reviewed the district court's approval of a class action settlement before class certification under Federal Rule of Civil Procedure 23(e). *Id.* at 953-55.

Although the other three cases cited by the Laga Parties for their proposition did involve CERCLA consent decrees in some manner, they do not support their position here. The Laga Parties cite *United States v. Davis*, 261 F.3d 1 (1st Cir. 2001). However, they do not cite that portion of the *Davis* opinion addressing the non-settlors' challenge to the CERCLA consent decree, in which the court of appeals applied the same abuse of discretion standard applied by the court of appeals below in rejecting the non-settlors' challenge to the consent decree. *Davis*, 261 F.3d at 21-28.[9] There is no suggestion whatsoever that the court of appeals in *Davis* applied a clearly erroneous standard to its review of the rationale supporting the district court's approval of the CERCLA consent decree. The Laga Parties instead cite to that portion of the *Davis* opinion which addressed certain parties' objections to the district court's declaratory judgment ruling. Petition at 4 n.2 and 15 n.13 (citing *Davis*, 261 F.3d at 37). At that portion of its opinion, the court of appeals in *Davis* did apply a clearly erroneous standard to findings of fact entered pursuant to Federal Rule of Civil Procedure 52(a) after a 26-day bench trial. *Davis*, 261 F.3d at 18 and 37. *See also id.* at 31 (identifying the clearly erroneous standard

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[9] In *Davis*, 261 F.3d at 21, quoting *Charles George*, 34 F.3d at 1085, the court of appeals observed as follows:

> Because an appellate court ordinarily cannot rival a district court's mastery of a factually complex case—a mastery often, as in this instance, acquired through painstaking involvement over many years—the district court's views must also be accorded considerable respect.

applicable to factual findings entered after trial).[10] No bench trial involving the Laga Parties was held below.[11] No declaratory judgment against the Laga Parties was entered below.[12]

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[10] The court of appeals in *Davis* cited its prior decision in *Dedham Water Co. v. Cumberland Farms Dairy*, 972 F.2d 453, 457 (1st Cir. 1992), in support of this standard. In *Dedham Water*, the court of appeals expressly stated "[w]hen a district court makes findings of fact *in a bench trial*, the clear-error standard pertains." *Id.* (emphasis added).

[11] The Laga Parties confuse the issue by asserting that the district court must have stated its findings of fact pursuant to Rule 52(a) or Rule 56 of the Federal Rules of Civil Procedure, and that the proper standard of review must be guided by whether the court issues them under one rule or the other. *See, e.g.*, Petition at 13 and n.11; and 15 and n.13. However, the district court did not set forth its findings of fact after hearing evidence in a bench trial or in the context of granting or refusing an interlocutory injunction, the two contexts in which Rule 52(a) applies. Nor did the district court set forth its findings in the context of determining a motion for summary judgment under Rule 56. For that reason, the numerous arguments made by the Laga Parties on that flawed premise are irrelevant.

[12] The district court set forth its findings of fact in the context of explaining its reasoning for exercising its discretion to approve the CERCLA consent decree as fair, reasonable, and in the public interest. Although the district court certainly could have set forth its reasoning for approving the Consent Decree without setting forth express "findings of fact" as it did, the form in which it expressed its rationale does not somehow alter the deferential standard of review accorded to the district court's approval of a CERCLA consent decree. Similarly, the district court's use of the term "conclusions of law" to characterize its legal basis for exercising its discretion to approve the CERCLA consent decree here does not subject it to a more exacting standard of review. The cases cited by the Laga Parties (Petition at 22) do not suggest otherwise. *See Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982) (addressing the distinction between findings of fact under Federal Rule of Civil Procedure 52(a) and conclusions of law in appeal pursuant to Title VII of the Civil Rights Act of 1964); and *Henglein v. Colt Indus. Operating Corp.*, 260 F.3d 201, 208 (3d Cir. 2001) (reviewing findings of fact and conclusions of law after a non-jury trial under ERISA).

The Laga Parties similarly mischaracterize the decision in *United States v. Colorado & Eastern R. R.*, 50 F.3d 1530, 1538 (10th Cir. 1995). Petition at 4 n.2 and 15 n.13. As in *Davis*, the court of appeals in *Colorado & Eastern* addressed appellants' challenge to findings of fact entered pursuant to Rule 52(a) after a bench trial of a CERCLA contribution claim, not as part of its approval of a consent decree. *Colorado & Eastern*, 50 F.3d at 1534 and 1538.[13]

The final case cited by the Laga Parties for this key proposition is *United States v. Montrose Chem. Corp. of California*, 50 F.3d 741, 746 (9th Cir. 1995). Unlike those portions of the *Davis* and *Colorado & Eastern* opinions cited by the Laga Parties, the *Montrose* opinion did involve an appellate court's review of the judicial approval of a CERCLA consent decree. However, the Court of Appeals for the Ninth Circuit recognized the same standard for assessing whether to approve a CERCLA consent decree and the same abuse of discretion standard of review on appeal as did the court of appeals below. *Montrose*, 50 F.3d at 746. In discussing the abuse of discretion standard of review applicable in that context, the court of appeals stated:

> *Under the abuse of discretion standard*, we cannot reverse unless we are convinced that the court below committed a clear error of judgment by failing to apply the correct law or by resting its decision on a clearly erroneous finding of material fact.

Id. at 746 (emphasis added).[14]

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[13] No portion of the *Colorado & Eastern* decision involved the appellate court's review of the judicial approval of a CERCLA consent decree.

[14] The reference to a "clearly erroneous finding of material fact" was in the context of describing the abuse of discretion standard, not as a wholly separate standard of review as the Laga Parties suggest. Moreover, given the Laga Parties' characterization of the district court's findings of fact

In *Montrose*, *id.* at 747-48, the court of appeals recognized that it "tread relatively uncharted territory in the area of Superfund litigation" by "holding that the district court erred in approving the proposed consent decree," but it did so applying an abuse of discretion standard, and only because it found that the proponent of the consent decree had provided the district court with no evidence at all upon which the district court could have based its evaluation of a critical aspect of the fairness of the consent decree. *Id.* at 746-47. The *Montrose* court explained:

> Notwithstanding this "swaddling," there is a fundamental difference in the review of the sufficiency of evidence to support a settlement and the situation where there is no evidence at all on an important point. There is, in fact, no evidence on this record from which the district court could have made any determination with respect to estimates of responsibility and damage. It is clear a district court may *abuse its discretion* by having no evidence to support its decision. [Citation omitted.]

Id. (emphasis added).[15]

Contrary to the Laga Parties' assertion that the *Montrose* opinion supports the applicability of a different standard of review on appeal, that opinion actually confirms the applicability of an abuse of discretion standard, as applied by the court of appeals below. The critical difference between this case and the situation in *Montrose* is that the proponents of the CERCLA consent decree here, mindful of the prior

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and conclusions of law as "irrelevant to the approval of the consent decree" (Petition at i), they can hardly be heard to assert that those findings of fact were material facts in the district court's ruling.

[15] The court of appeals in *Montrose* explained that in the context of "an informational vacuum"—where the government provided no evidence of its estimate of total natural resource damages —that the district court could not have assessed whether the consent decree was fair and reasonable. *Id.* at 747.

precedent in *Montrose*, made a substantial effort to provide the record support for the district court's assessment of the fairness and reasonableness of the CERCLA Consent Decree by submitting a two-volume Appendix gathered from the fruits of a decade-long investigation of the Tutu Site and submitting to the Court the estimate of the natural resource damages proposed by "one of two nationally known firms that performs these assessments." *See, e.g.*, Pet. App. 3a-4a.[16]

Contrary to the Laga Parties' mischaracterization of the court of appeals' opinion below, the court of appeals announced no new standard of review, but rather properly applied an abuse of discretion standard to the Laga Parties' challenge to the district court's approval of the CERCLA consent decree. Thus, there is no conflict with the precedent of other Circuits and no basis for this Court to grant review.

II. THE COURT OF APPEALS PROPERLY REJECTED AS BASELESS PETITIONERS' ARGUMENT THAT THE DISTRICT COURT'S FINDINGS WERE ERRONEOUS.

Not only did the court of appeals apply the proper standard of review in affirming the district court's approval of the Consent Decree, but it also correctly rejected as baseless the Laga Parties' challenge that the district court's findings of fact were erroneous. Moreover, even if there were any validity to the Laga Parties' argument in this regard (and there is not), the "fact bound" nature of the Laga Parties' challenge to the district court's rather detailed findings of fact does not support the Laga Parties' request that this Court grant review of the decision below.

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[16] As noted above, the Settling Parties also referenced an additional eight volumes of evidence previously submitted to the district court in connection with other pending motions in the CERCLA Action.

The court of appeals accurately described the extensive record submitted by the Settling Parties in support of their joint motion for approval of their CERCLA consent decree:

> In support of their joint motion to the District Court, the Settling Parties filed a two-volume appendix, including the consent decree and various EPA and other expert reports. The Trustee retained Industrial Economics to conduct a damage assessment, one of the two nationally known firms that performs these assessments. *Comm'r of the DPNR v. Esso Standard Oil*, Civ. No. 1998-206, at 20 (D.V.I. filed Oct. 15, 2001). The assessment here examined two types of losses: "use related loss" represented the cost to rehabilitate the contaminated portions of the Tutu aquifer; and "non-use related loss" assessed the lost value to the public from non-use of the aquifer. Industrial Economics calculated the use related loss at $16.9 million and estimated the non-use related loss at approximately $19 million. Its work was peer-reviewed by Dr. Raymond J. Kopp, a senior fellow at Resources for the Future, and Dr. Kevin J. Boyle, a professor of environmental economics at the University of Maine.

Pet. App. 3a-4a. *See also* Pet. App. at 12a ("The Settling Parties produced an extensive documentary record to support their joint motion. The record included exhibits, expert reports, and deposition testimony detailing the fruits of more than a decade of environmental investigation at the Tutu site.").

The court of appeals also emphasized that "the Laga Parties offered no factual or documentary support for their arguments before the District Court. They elected not to offer any expert witnesses and submitted no expert reports to challenge those submitted by the Settling Parties. While they provide express references to deposition testimony to this court on appeal, they failed to do so before the District Court." Pet. App. 8a. *See also* Pet. App. 12a ("In contrast, the Laga Parties presented no competing documents, testi-

mony, or analysis. They merely contested the Settling Parties' evidence as insufficient and replete with errors."); and Pet. App. 13a ("the Laga Parties failed to submit deposition testimony, expert reports, or analysis to support their criticism of the Settling Parties' evidence, and were afforded ample opportunity to be heard prior to and on February 14, 2001").

In view of the voluminous record submitted by the Settling Parties and the Laga Parties' failure to provide any record in opposition, the court of appeals tersely, yet appropriately, dismissed the Laga Parties' contention that the factual findings were "erroneous" and held that such attacks were "baseless." Pet. App. 14a n.7.[17]

Once the court of appeals unanimously affirmed the district court's approval of the Consent Decree, the Laga Parties abandoned their challenge to said approval. *See* April 21, 2003 Extension Motion, ¶ 4 ("The anticipated petition for rehearing would not seek reconsideration of [the court of appeals'] affirmation of the lower court's decision to approve the CERCLA settlement between appellees. Appellants do not intend to seek any stay and the petition for rehearing would not seek to hinder appellees' completion of their settlement"); May 5, 2003 Rehearing Petition, at 2 (the Laga Parties "do not seek reconsideration of the panel's affirmance of the district court's approval of appellees' settlement"); and August 19, 2003 Petition, at 1 ("Petitioners do not here contest the approval of the consent decree"). *See also*

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[17] In footnote 7 of its opinion, the court of appeals stated in full:

> The Laga Parties also attack specifically a number of findings of fact as being unsupported or contradicted by record evidence, and a number of conclusions of law as being erroneous. The basis for many of these arguments is the District Court's decision not to hold a full evidentiary hearing, which we have addressed above. We find these attacks baseless, especially given the Laga Parties' failure to offer their own independent evidence to contradict the volumes of evidence submitted by the Settling Parties.

Petition, at 22 (where the Laga Parties' ultimate request for relief does not seek reversal of the lower courts' approval of the consent decree, but rather only seeks to have the underlying findings of fact and conclusions of law vacated).

The Laga Parties' candid admission that they do not seek to undo the lower courts' approval of the Consent Decree here confirms the "fact bound" nature of their appeal. Even if this Court granted the Laga Parties' Petition, and even if it ultimately ruled in favor of the Laga Parties, the lower courts' approval of the Consent Decree would remain undisturbed. The rationale for Supreme Court Rule 10's express statement that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings" is well illustrated here. After all, why should this Court expend its limited resources to evaluate an appeal where the ultimate relief would never alter the lower courts' approval of the Consent Decree?[18]

Nor does the Laga Parties' purported concern about the potential adverse effect of the district court's findings of fact in subsequent proceedings support their request for review by this Court. First, the Laga Parties do not even assert that the findings would certainly have preclusive effect in subsequent proceedings. Instead, they hedge their argument on this point. *See, e.g.*, Petition at 1 ("which have *potentially* continuing effect on the remaining issues in the NRD Action"), 10 (which "*could* impact directly on all future proceedings in the NRD Action"), and 20 (the trial court "*may* be inclined or even compelled to rule in accordance with his existing and outstanding opinion") (empha-

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[18] *See also Texas v. Mead*, 465 U.S. 1041, 1043 (1984) (recognizing that this Court generally does not "grant a certiorari to review evidence and discuss specific facts"); and *Vasquez v. United States*, 454 U.S. 975, 977 (1981) (it is "appropriate to decline to review a decision that turns on details of the evidence that are not likely to be duplicated in other cases").

sis added).[19] Second, as noted by the court of appeals, "[w]hether the court's findings have a preclusive effect against the Laga Parties [in the CERCLA and NRD Actions] only becomes ripe for determination if and when the Settling Parties use the findings and conclusions in other contexts." Pet. App. 13a n.5.[20] The hypothetical use of the findings and conclusions in subsequent proceedings in the NRD Action is not ripe for review by this Court and cannot justify the Laga Parties' effort to obtain this Court's review of this issue.

Therefore, this Court should not grant the Laga Parties' "fact bound" challenge to purportedly erroneous findings, particularly where even a successful appeal would not alter the lower courts' approval of the CERCLA consent decree and where any potential use of the findings is hypothetical at best and clearly not ripe for determination.

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[19] In fact, the Laga Parties note that the trial court denied summary judgment motions in the CERCLA Action at the same time it approved the CERCLA consent decree. The trial court apparently did not feel compelled to extend its findings set forth in the context of approving the CERCLA consent decree to the Rule 56 motions pending at the very same time.

[20] As noted by the Laga Parties in their Petition (ii-iii), the Laga Parties and the Esso and Texaco parties settled their claims in the CERCLA Action during the pendency of the appeal below so it is clear that the findings and conclusions will never be used in that proceeding.

CONCLUSION

The Laga Parties' Petition should be denied.

Respectfully submitted,

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